PRESTIGE GLOBAL RESOURCES SDN BHD v. GABUNGAN HARTAMAS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[COMPANIES WINDING-UP NO: 28NCC-563-07-2014]
24 NOVEMBER 2014

COMPANY LAW: *Winding up – Petition – Disputed debt – Claim by contractor for payment under construction agreement – Duly approved Interim Payment Certificates submitted for work done by contractor – Demand under s. 218(2)(a) of Companies Act 1965 issued without obtaining prior judgment – Whether bona fide dispute on debt shown – Whether respondent estopped from disputing debt due to dismissal of Fortuna injunction application – Whether creditor must obtain a monetary judgment before filing winding up petition – Whether debt admitted by respondent – Commercial solvency test – Whether respondent rebutted presumption of insolvency – Companies Act 1965, ss. 218 1(e); (2)(a)*

EVIDENCE: *Documentary evidence – Extrinsic evidence – Admissibility – Claim by contractor for payment under construction agreement – Duly approved Interim Payment Certificates submitted for work done by contractor – Whether clauses in contract providing for conclusiveness of Interim Payment Certificates could be varied based upon quantity surveyor's letters – Evidence Act 1950, ss. 91 & 92*

EVIDENCE: *Privilege – Legal professional privilege – Without prejudice communications – Communication between solicitor and client – Letter exhibited in petitioner's affidavit – Failure to object by respondent – Whether respondent waived its right to object – Whether express consent required – Whether letter admissible – Evidence Act 1950, s. 126*

The respondent appointed the petitioner as the main contractor to construct terrace houses ('the project'). The petitioner provided the respondent a performance bond in respect of the project for a sum of RM200,000 ('the bond'). In accordance with the contract between them, the petitioner submitted two duly approved 'Interim Payment Certificates' ('the IPC's') to the respondent for work done by the petitioner in respect of the project for a total value of RM605,300. The respondent paid only RM70,000 to the petitioner in respect of the IPC's and failed to pay the balance. The petitioner thus terminated the contract and demanded the respondent to pay a total of RM802,556.42 being the total of the outstanding balance under the IPC's, the bond sum and the retention sum. Pursuant to the respondent's request, the petitioner vacated the construction site and handed over the site to the respondent. The petitioner then issued a demand under s. 218(2)(a) of the Companies Act 1965 ('CA') ('the statutory demand') for the respondent to pay the claimed sums. The respondent did not pay the claimed sums and instead applied to the court for a *Fortuna* injunction to restrain the petitioner from filing a winding up petition against the respondent. The *Fortuna* injunction application was dismissed. The petitioner then filed the present winding up petition to wind up the respondent under s. 218(1)(e) of the CA.

The respondent objected to the petition on the grounds, *inter alia*, (i) that the respondent was not satisfied with the work done by the petitioner; (ii) that there was a *bona fide* dispute regarding the alleged indebtedness; (iii) that the IPC's had no binding effect as the IPC's were interim in nature; and (iv) that the respondent was still active in business.

Held (allowing petition with costs):

(1) As the respondent did not appeal to the Court of Appeal against the dismissal of the respondent's *Fortuna* injunction application, the dismissal of the respondent's *Fortuna* injunction application was final and *res judicata*. This attracted the application of the issue estoppel doctrine. Based on the issue estoppel doctrine, the respondent was estopped by the dismissal of the *Fortuna* injunction application from raising in this petition that there was a *bona fide* dispute regarding the respondent's indebtedness to the petitioner. (para 19)

(2) The IPC's had been issued under cl. 30.1 and the Period of Honouring Certificates had long expired. According to ss. 91 and 92 of the Evidence Act 1950 ('EA'), no evidence can be adduced by either the petitioner or the respondent to contradict, vary, add to or subtract from the terms and conditions of the contract, in particular cls. 30.1 and 30.3. Accordingly, the respondent could not rely on the quantity surveyor's letters as a justification for not paying the IPC's. Clause 30.1 did not provide for such an excuse. In fact, after the architect had issued an IPC, the architect could not amend that IPC unless there was a clerical, computational or typographical error or errors of a similar nature under cl. 30.3. (paras 23 & 24)

(3) The "without prejudice" letter *ie* the respondent's first admission of indebtedness was exhibited in the petitioner's affidavit in support. There was no objection by the respondent to the admissibility of the respondent's first admission of indebtedness as evidenced in the petition. As such, the respondent had waived its right to object to the admissibility of the respondent's first admission of indebtness. (paras 30 & 31)

(4) The respondent also failed to object to the respondent's second admission of indebtness which was exhibited in the petitioner's affidavit in support. The second admission of indebtedness constituted a legal communication between the respondent and its solicitors. However, the court could not accept the respondent's second admission of indebtedness as evidence because there must be an express consent by the respondent under s. 126(1) of the Evidence Act 1950 for the petitioner to adduce the respondent's second admission as evidence. The respondent's third admission of indebtedness and the respondent's first admission of indebtedness clearly supported the present petition. (paras 33, 34, 37, 38 & 39)

(5) The commercial solvency test is the test to be applied in deciding whether the respondent was able to pay its debts under s. 218(1)(e) of the CA. Applying the test, it was clear that, on a balance of probabilities, the respondent was unable to pay its debts when such debts were due. Upon the respondent's failure to pay the claimed sum as stated in the statutory demand, a rebuttable presumption of the respondent's insolvency arose under s. 218(2)(a) of the CA whereby the respondent had a legal burden to rebut such a presumption on a balance of probabilities. However, the respondent had failed to adduce credible evidence to rebut the presumption on its solvency under s. 218(2)(a) of the CA on a balance of probabilities. (para 42)

Case(s) referred to:

A-B Chew Investments Pte Ltd v. Lim Tjoen Kong [1989] 2 CLJ 1109; [1989] 2 CLJ (Rep) 840 HC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(foll)***

Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 309 CA ***(refd)***

BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 591 HC ***(refd)***

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 FC ***(dist)***

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2009] 3 CLJ 125 FC ***(refd)***

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2007] 6 CLJ 613 CA ***(refd)***

Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***

Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 HC ***(refd)***

Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd [2014] 7 CLJ 1 FC ***(refd)***

KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd [2013] 9 CLJ 1003 HC ***(dist)***

Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 CA ***(refd)***

Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 1 LNS 44 PC ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 HC ***(dist)***

Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn Bhd [1991] 2 MTC 92 SC ***(refd)***

Pac Asian Services Pte Ltd v. European Asian Bank AG [1987] 1 LNS 143 CA ***(dist)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(foll)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(foll)***

Re Lympne Investments Ltd [1972] 2 All ER 385 ***(dist)***

Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver And Liquidator of Mosbert Acceptance Ltd [1977] 1 LNS 109 HC ***(refd)***

Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637 SC ***(foll)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 217(1)(b), 218(1)(e), (2)(a), (c)

Evidence Act 1950, ss. 23, 91, 92, 126(1), 128

Companies Act [Sing], s. 254(2)(a)

Other source(s) referred to:
Walter Woon, *Company Law*, Revised 3rd edn, 2009, p 710

For the petitioner - Cheah Tien Eu; M/s Suhaimi Khor Zulkifli & Chang
For the respondent - Fadhli Salleh; M/s Fadzil & Eddin

Reported by Amutha Suppayah

JUDGMENT

Wong Kian Kheong JC:

Background

[1] This case discusses whether a company can be wound up under s. 218(1)(e) of the Companies Act 1965 ('CA') without a monetary judgment being ordered against that company.

[2] By a letter of award dated 30 August 2012 ('contract'), the respondent company ('respondent') appointed the petitioner company ('petitioner') as the main contractor to construct 44 units of terrace houses for a sum of RM13,075,673.50 ('project').

[3] By way of the respondent's letter dated 12 June 2012 to the petitioner, both parties agreed that the petitioner would provide to the respondent a performance bond in respect of the project for a sum of RM200,000 ('bond'). The bond was furnished by the petitioner to the respondent by way of a cheque dated 27 June 2012.

[4] In accordance with the contract, the petitioner submitted two "Interim Payment Certificates" dated 28 November 2012 and 3 January 2013 ('IPC's') to the respondent for work done by the petitioner in respect of the project for a total value of RM605,300. The IPC's had been approved by the project's quantity surveyor, Messrs Kaf Consult ('QS'), and the architect for the project, Arkitek Asaseni Sdn Bhd ('Architect').

[5] The respondent paid only RM70,000 to the petitioner in respect of the IPC's ('respondent's part payment').

[6] As the petitioner had not been paid in respect of the IPC's, the petitioner terminated the contract ('termination') by way of a letter dated 26 February 2013 from the petitioner's solicitors to the respondent ('letter dated 26 February 2013 from petitioner's solicitors'). The letter dated 26 February 2013 from petitioner's solicitors also demanded the respondent to pay the petitioner a total of RM802,556.42 ('claimed sum') consisting of the following amounts:

(a) a sum of RM535,307.83 as the outstanding balance under the IPC's after deducting the respondent's part payment;

(b) the bond of RM200,000; and

(c) a sum of RM67,256.42 retained by the respondent ('retention sum') which was to be refunded by the respondent to the petitioner upon the termination.

[7] In response to the letter dated 26 February 2013 from petitioner's solicitors, the respondent demanded by way of a letter dated 19 April 2013 to the petitioner ('respondent's letter dated 19 April 2013') for:

(a) the petitioner to vacate the construction site ('site') within seven days from the date of the respondent's letter dated 19 April 2013. The respondent stated that if the petitioner did not vacate the site within the stipulated seven days, the respondent would not be responsible for any loss, damage and destruction to the goods and property on the site; and

(b) the petitioner to be responsible for all dealings with the sub-contractor for the project.

[8] The petitioner complied with the respondent's letter dated 19 April 2013 and handed over the site to the respondent.

[9] The petitioner issued a demand dated 27 June 2013 under s. 218(2)(a) CA ('statutory demand') for the respondent to pay the claimed sum to the petitioner within 21 days from the date of the respondent's receipt of the statutory demand ('stipulated period').

[10] The respondent received the statutory demand on 30 June 2013 and the last day of the stipulated period was 21 July 2013. The respondent did not pay the claimed sum.

[11] The respondent applied to the Kuala Lumpur High Court ('KLHC') in originating summons No. 24 NCC-277-08/2013 for an injunction to restrain the petition from filing a winding up petition against the respondent ('respondent's *Fortuna* injunction application').

[12] The KLHC dismissed the respondent's suit with costs ('dismissal of respondent's *Fortuna* injunction application'). The respondent did not appeal to the Court of Appeal against the dismissal of the respondent's *Fortuna* injunction application.

This Petition

[13] The petitioner filed a petition in this court to wind up the respondent under s. 218(1)(e) CA ('this petition').

Applicable Law

[14] The relevant part of s. 218 CA reads as follows:

218(1) **The Court may order the winding up if:**

...

(e) **the company is unable to pay its debts**;

...

218(2) **A company shall be deemed to be unable to pay its debts if**:

(a) *a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum* or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) **execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part**; **or**

(c) *it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company*. (emphasis added)

Respondent's Submission

[15] The respondent has objected vigorously to this petition on the following grounds:

(a) the respondent is not satisfied with the work done by the petitioner under the contract. For this purpose, the respondent exhibited the following letters in its affidavit which had been filed in opposition to this petition:

(i) the respondent's letter dated 29 October 2012 to the petitioner ('respondent's letter dated 29 October 2012');

(ii) the petitioner's letter dated 31 October 2012 to the respondent ('petitioner's letter dated 31 October 2012'); and

(iii) the respondent's letter dated 19 November 2012 to the petitioner ('respondent's letter dated 19 November 2012').

Based on the above letters, the respondent contended that there was a *bona fide* dispute with the petitioner regarding the respondent's alleged indebtedness to the petitioner;

(b) the IPC's have no binding effect as the IPC's are interim in nature. The respondent relied on two letters dated 29 November 2012 and 3 January 2013 from the QS to the respondent ('QS's letters') stating that it was the "prerogative" of the respondent to make any payment of the IPC's or not at all;

(c) the respondent is still active in business. In fact, the respondent has already 36 purchasers for the 44 terrace houses to be built in the project; and

(d) the respondent relies on the following cases to oppose this petition:

(i) the English High Court case of *Re Lympne Investments Ltd* [1972] 2 All ER 385;

(ii) the High Court's judgment in *Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd* [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451; [1990] 1 MLJ 372; and

(iii) the High Court case of *KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd* [2013] 9 CLJ 1003; [2014] 8 MLJ 434.

Summary Of This Court's Decision

[16] I allow this petition with costs on the following grounds, in brief:

(a) in view of the dismissal of the respondent's *Fortuna* injunction application, the respondent is estopped by the doctrine of issue estoppel from contending that there is a *bona fide* dispute regarding the respondent's indebtedness to the petitioner;

(b) under the contract, the respondent is bound to pay to the petitioner in respect of the IPC's. The respondent's contractual obligation to pay for the IPC's cannot be contradicted or varied by QS's letters;

(c) a company's inability to pay its debts under s. 218(1)(e) CA is not proven solely by a monetary judgment granted against that company. Such an inability can be proven by any credible means on a balance of probabilities; and

(d) there is sufficient evidence on a balance of probabilities that the respondent is unable to pay its debts under s. 218(1)(e) CA such as:

(i) the respondent's failure to pay the IPC's;

(ii) the respondent's own written admission of indebtedness to the petitioner; and

(iii) the respondent's failure to pay after the statutory demand has been served on the respondent.

Respondent Is Estopped By Issue Estoppel Doctrine

[17] Ramly Ali JCA (as His Lordship then was) in the Court of Appeal case of *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, at pp. 958-959, explained a "*Fortuna*" injunction application as follows:

> An application for an injunction to restrain an intended winding-up petition against a company is known as a "*Fortuna* Injunction", taking its name from the case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding-up petition and the two principles that guide courts in the grant of an injunction to that effect. (see also: *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (Court of Appeals).

A *The first principle laid down in that case in that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie,*:

B (i) **the intended petition has no chance of success, as a matter of law as well as a matter of fact**; and

(ii) **the presentation of such petition (which has no chance of success) might produce irreparable damage to the company** ...

The second principle established in the Fortuna case is that an injunction of that
C *nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.*

(emphasis added)

D **[18]** The dismissal of the respondent's *Fortuna* injunction application means that the respondent has failed to satisfy the KLHC that the two principles to grant a *Fortuna* injunction apply to restrain the petitioner from filing a winding up petition.

[19] As the respondent did not appeal to the Court of Appeal against the
E dismissal of the respondent's *Fortuna* injunction application, the dismissal of the respondent's *Fortuna* injunction application is final and *res judicata*. This will attract the application of the issue estoppel doctrine as laid down by the Supreme Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 at pp. 791-793; [1995] 3 MLJ 189, at pp. 197-200, as follows:

F *What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that,*
G *it is in the public interest that there should be finality in litigation – interest rei publicae ut sit finis litium*. **It is only just that no one ought to be vexed twice for the same cause of action** – *nemo debet bis vexari proeadem causa*. **Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy**.

H Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to
I give rise to confusion ...

Thus, **there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type**.

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.

In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel per rem judicatum and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence …

On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision …

(emphasis added)

[20] Based on the issue estoppel doctrine explained in *Asia Commercial Finance (M) Bhd*, the respondent is estopped by the dismissal of the respondent's *Fortuna* injunction application, from raising in this petition that there is a *bona fide* dispute regarding the respondent's indebtedness to the petitioner under the contract.

[21] Assuming I am wrong in invoking the issue estoppel doctrine in this case, I will discuss the other matters raised by the respondent to resist this petition.

Is Respondent Bound To Pay IPC's Under Contract?

[22] The contract in this case is based on "PAM (Pertubuhan Arkitek Malaysia) Contract 2006 (Without Quantities)". Clauses 30.1 (cl. 30.1) and 30.3 (cl. 30.3) of the contract provide as follows:

30.1 The Contractor [Petitioner] shall submit a payment application at the Interim Claim Interval stated in the Appendix with complete details and particulars as required by the Architect, to enable him to consider and ascertain the amount to be included in an Interim Certificate. Upon receipt of the Contractor's details and particulars, the Architect shall, within twenty one (21) Days from the date of receipt of the Contractor's application, issue an Interim Certificate to the Employer [Respondent] with a copy to the Contractor, and the Employer shall thereafter pay the amount certified to the Contractor's within the Period of Honouring Certificates …

30.3 Save for clerical, computational or typographical error or errors of a similar nature, the Architect shall not be entitled to revise or correct any payment certificate issued by him under the Contract. Provided always that the Architect may, by a later certificate, make correction or modification in respect of any valuation errors in any earlier certificate.

(emphasis added)

[23] The phrase "Period of Honouring Certificates" is defined in art. 7(ap) of the "Articles of Agreement" in the contract to mean the period for honouring certificates stated in the appendix to cl. 30.1. In this case, it is clear that the IPC's have been issued under cl. 30.1 and the "Period of Honouring Certificates" has long expired.

[24] Before I discuss cases regarding IPC or any certificate of progress payment certified by an architect to be payable in a construction contract, I bear in mind the following matters:

(a) according to ss. 91 and 92 of the Evidence Act 1950 ('EA'), no evidence can be adduced by either the petitioner or the respondent to contradict, vary, add to or subtract from the terms and conditions of the contract, in particular cls. 30.1 and 30.3. I rely on the Federal Court's judgment in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, at pp. 227-228. Accordingly, I find that the respondent cannot rely on the QS's letters as a "justification" for not paying the IPC's. Clause 30.1 does not provide for such an excuse. In fact, after the architect has issued an IPC, the architect cannot amend that IPC unless there is a "clerical, computational or typographical error or errors of a similar nature" under cl. 30.3;

(b) the interpretation of a contractual provision is a question of law to be decided by the court and not by witnesses through their oral evidence – the Court of Appeal's judgment in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96, at pp. 103-104. Accordingly, the construction of the cls. 30.1 and 30.3 does not depend on affidavit evidence adduced in this petition; and

(c) this petition concerns a construction contract. In construing a commercial contract, I am guided by the Federal Court's judgment in *Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 309; [2010] 1 MLJ 597, at pp. 606-607, as follows:

> The agreement in the present case is one that is not regulated by statute. In short, it is not a contract governed by the housing development legislation. *The appellant and respondent were therefore at complete liberty, in accordance with the doctrine of freedom of contract to agree on any terms they thought fit. The role of the court is to interpret the contract in a sensible fashion. See Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1. As Lord Steyn said in Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 at p 771:*

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, *the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.* In contradistinction to this modern approach, Lord Greene MR's judgment in *Hankey v. Clavering* [1942] 2 KB 326 is rigid and formalistic.
>
> (emphasis added)

[25] An objective and commercially sensible interpretation of cl. 30.1 clearly shows the manifest intention of the petitioner and the respondent that once the architect certifies a sum to be payable in an IPC, the respondent "shall" pay that certified sum to the petitioner. The use of the mandatory term "shall" in cl. 30.1 supports the above construction. As the respondent has a clear obligation to pay the IPC's to the petitioner under cl. 30.1, such an obligation cannot be contradicted or varied by QS's letters according to ss. 91 and 92 EA.

[26] My above interpretation of cls. 30.1 and 30.3 is supported by the following cases:

(a) in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345, at pp. 349, 350, 351, 356, 365 and 367, Edgar Joseph Jr SCJ in the Supreme Court held as follows:

> The issue of central importance to this appeal is *whether, in O. 14 proceedings, upon the proper construction of a building contract dated 27 April 1989, ("the contract"), whereby the plaintiff, Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. ("the builder"), had agreed to construct a private hospital to be named "Dr. Leela Medical Centre" for the defendant, Dr. Leela's Medical Centre Sdn. Bhd. ("the employer"), there is an obligation imposed upon the employer to pay at once the sum of RM433,288.97 appearing in the Penultimate Progress Payment Certificate issued on 3 August 1992, by the architect ("the Penultimate Progress Payment Certificate"), pursuant to clause 30(1) of the contract, regardless of pending disputes, including cross-claims by the employer alleging defective work or over-valuation, which allegedly exceeded the sum so certified ...*
>
> ... the question of critical substance which arose for decision was: *what were the obligations of the employer to pay upon being served with the Penultimate Progress Payment Certificate under the contract when, as here, the employer has made claims for liquidated and non-liquidated damages against the builder arising from its performance of the contract?*
>
> …
>
> To revert to the question of central importance to this appeal referred to in the opening paragraph of this judgment, *we would make the preliminary observation that the Penultimate Progress Payment Certificate, the subject matter of*

this appeal, was, having regard to Hiap Hong & Co Pte Ltd v. Hong Huat Co (Pte) Ltd [1987] 2 MLJ 551, undoubtedly an Interim Certificate within the meaning of clause 30(1) of the contract which provides:

> *30(1) At the period of interim certificate named in the appendix to these conditions the architect shall issue a certificate stating the amount due to the contractor from the employer, and the contractor shall, on presenting any such certificate to the employer, be entitled to payment therefor within the period for honouring certificates named in the appendix to these conditions.* Interim valuations shall be made whenever the architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an interim certificate.

...

Pausing at this point, we would observe that nowhere in the contract is there any provision whereby the builder must execute the works to the satisfaction of the employer. In other words, *according to the contract, the only instructions which the builder is under an obligation to comply with are those emanating from the architect.* This, would be in accordance with the reasonable expectations of businessmen engaged in the construction industry. Were it otherwise and, say, the builder were also under an obligation to comply with instructions emanating from the employer, a situation could arise where the builder might be faced with conflicting instructions from the architect and the employer, with resulting confusion, not conducive to a smooth performance of a contract.

Cast in his role of a professional middleman, the architect should, prima facie, be in an ideal position to ensure that both employer and contractor punctually carry out their respective obligations under the contract. This is not to say that if the employer is dissatisfied with the performance of his architect, he is without remedy. In such a situation, the employer may terminate the services of his architect and appoint a substitute architect or even sue his old architect. (See Sutcliffe v. Thackrah [1974] AC 727).

…

In all the circumstances, *our conclusion therefore, is, that having regard to the meaning of the particular words of the contract, in particular the clauses which we have referred to and discussed, there is a clear implication that the parties had intended that so far as claims for payment on certificates are concerned, the ordinary common law right of set-off was to be extinguished.*

That was sufficient to conclude this appeal in favour of the builder.

…

In all the circumstances, *we had no hesitation in allowing this appeal with costs both here and below, setting aside the judgment of Mr Justice Wan Mohammed and substituting, in lieu thereof, summary judgment in favour of the builder for the sum certified to be due and payable to it under the Penultimate Progress Payment Certificate and interest thereon as prayed.*

(emphasis added)

(b) in *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591, at pp. 599-600 and 602, Jeffrey Tan J (as His Lordship then was) in the High Court wound up the respondent company solely on the basis that the respondent company could not pay progress payment certificates for building work to the petitioner company:

> **There could be no doubt. The petitioner was entitled, in the present case, to payment in full of the sums stated in the four progress payment certificates "within 30 days"** (see condition 30(1) of the Articles of Agreement read together with the appendix to the conditions of Agreement – encl. 11 exh. "T-4") of the presentation of those certificates. There were no provisions in the conditions of the Agreement for cross-claims in the nature of the present cross-claim to be set-off or deducted from the amounts due under any progress payment certificate. *The respondent could not withhold payment of the said progress payment certificates on account of its cross-claim, a cross-claim that yet was not made and still to be litigated or arbitrated at the end of the day, ie, after payment first of the progress payment certificates. Quite clearly, so far as the four progress payments are concerned, that the respondent was and is truly indebted to the petitioner, there could be no bona fide dispute. And there is no bona fide dispute regarding the indebtedness imputed against the respondent*. Those progress payment certificates had temporary finality, and other than the one bare statement that the respondent would be instituting action against the architect, there is not a scrap of evidence, indeed no such evidence was put forward, that the sums mentioned in the certificates were erroneous by reason of any fraud, dishonesty or fraudulent concealment relating to the works, or any part thereof, or to any matter dealt with in the said progress payment certificates. **Unquestionably, there was an undisputable debt and it was not paid**. It has been said, "that a creditor who cannot get paid is more or less entitled as of right to a winding-up order" (*New South Wales Rugby League v. United Telecasters Sydney Ltd* 4 ACSR 510, 511, per Young J). Perhaps, it has been over-stated. But still, as an unpaid and unsatisfied creditor, the petitioner was entitled to demand for payment of the undisputable debt from the respondent, and to present, if its demand was not met, this winding-up petition (on that right of an unpaid creditor to petition for a winding-up order, see *Morgan Guaranty Trust (ibid)* at 97). So how could Mr Ong say that this unsatisfied creditor of an undisputable debt had filed this petition to put pressure on the respondent to pay the debt? It could not be more unreasonable
>
> ...
>
> What is clearly established however is, that *the respondent failed on four consecutive occasions to honour the progress payment certificate presented, which is itself evidence of the respondent's inability to pay its debts, and, that the respondent neglected, despite the statutory demand of the petitioner, to pay the sum demanded, which give rise to the presumption that the respondent is unable pay its debts.*
>
> (emphasis added)

The High Court's judgment in *BMC Construction Sdn Bhd* has been affirmed on appeal by the Court of Appeal in *Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2007] 6 CLJ 613. In the Court of Appeal case of *Dataran Rentas Sdn Bhd*, Zulkefli Makinudin JCA (as His Lordship then was) held as follows, at p. 694:

> *Applying the legal principles laid down by the Federal Court in Pembenaan Leow Tuck Chui's case, it is our judgment that the appellant have no right to deduct or set off against the sums certified under the interim certificates. The respondent is entitled to payment immediately and as such the debt cannot be disputed and the appellant has no meritorious defence*.

(emphasis added)

The respondent company's application to Federal Court for leave to appeal against the Court of Appeal's decision in *Dataran Rentas Sdn Bhd* has been dismissed by the Federal Court in *Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2009] 3 CLJ 125; and

(c) in *Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd* [2014] 7 CLJ 1, at pp. 30-31, Jeffrey Tan FCJ in the Federal Court explained the purpose of an interim certificate as follows:

> It should not be lost that *"the purpose of an interim certificate is to provide by payments on account a cash-flow to enable the contractor to finance the work" Crown House Engineering Ltd v. Amec Projects Ltd (1989) 6 Const LJ 141, per Slade LJ), to enable interim payments to be made to the contractor as the Works progress (Tameside Metropolitan Borough Council v. Barlow Securities (Group Services) Limited (2001) 75 ConLR 112; [2001] EWCA Civ 1). The primary purpose of the interim certificates in this kind of contract is to ensure that the contractor will receive regular stage payments as his work progresses (London Borough of Camden v. Thomas McInerney & Sons Ltd (1986) 9 ConLR 99; see also Rohcon Ltd v. SIAC Architectural Ltd [2003] IEHC 1133S 01) so that the subcontractor can have the money in hand to get on with his work and the further work he has to do* (*Dawnays Ltd v. F G Minter Ltd and another* [1971] 2 All ER 1389 per Lord Denning MR, which *dictum* was adopted by the Federal Court in *Bandar Raya Developments Bhd v. Woon Hoe Kan & Sons Sdn Bhd* [1972] 1 MLJ 75). *"... the purpose of interim certificates is to see that the contractor is in sufficient funds to carry on the construction as it progresses (Unpaid Interim Payment Certificates by Vinayak Pradhan [1997] 2 MLJ xv).*

(emphasis added)

[27] Based on the clear wording of cls. 30.1 and 30.3 as interpreted in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd* and *Dataran Rentas Sdn Bhd*, I have no hesitation to decide as follows:

(a) the respondent is legally bound to pay to the petitioner the sums certified by the Architect in the two IPC's;

(b) the respondent is not entitled to rely on the respondent's letter dated 29 October 2012, the petitioner's letter dated 31 October 2012 and the respondent's letter dated 19 November 2012 ('three letters') to dispute the petitioner's claim under the IPC's because:

(i) the three letters were sent before the architect certified the IPC's. In other words, if the respondent's complaints about the petitioner's construction work ('respondent's allegations') were true, the architect would not have issued the IPC's. Under cl. 30.3, the architect may issue a "later certificate, make correction or modification in respect of any valuation errors in any earlier certificate". Subsequent to the IPC's, the architect did not issue any "corrective" certificate;

(ii) if the respondent's allegations were true, the respondent's part payment of RM70,000 would not have been made; and

(iii) after the termination, the respondent is at liberty to file a suit or commence arbitration proceedings in respect of the respondent's allegations and/or the termination. No suit or arbitration proceedings has been instituted concerning the respondent's allegations and/or the termination. It is clear that the respondent's allegations constitute an afterthought to oppose this petition; and

(c) upon termination, cls. 26.4(a) and (b) of the contract (cls. 26.4(a) and (b)) come into effect. Clauses 26.4(a) and (b) read as follows:

> 26.4 In the event that the employment of the Contractor is determined under Clause 26.1 or 26.3, the following shall be the respective rights and duties of the [Petitioner] and [Respondent]:
>
> (a) the [Petitioner] shall within fourteen (14) Days or within such longer period as may be agreed in writing by the Architect, remove from the Site all his temporary buildings, construction plant, tools, material and goods and shall give facilities for his Nominated Sub-contractors to do the same; and
>
> (b) *the [Respondent] shall allow or pay to the [Petitioner] the total value of work properly executed and the value of materials and goods supplied including any loss and/or expense suffered by the [Petitioner] caused by such determination*.
>
> (emphasis added)

It is clear that upon termination, the respondent is obliged under cl. 26.4(b) to pay the petitioner.

Does Petitioner Need Monetary Judgment To Wind Up Respondent?

[28] The following appellate decisions have clearly held that a creditor need not obtain a monetary judgment before filing a winding up petition:

(a) in *Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn Bhd* [1991] 2 MTC 92; [1991] 1 MLJ 95, at p. 97, the Supreme Court in a judgment given by Hashim Yeop Sani CJ (Malaya) decided as follows:

> *It would seem to us unarguable on the facts that the petitioner had on 10 December 1987, that is, the date of filing of the petitioner, a prima facie right of an unpaid creditor to file the petition. There was no evidence that he payment was 'stage managed' and even if it was, it would make no difference as: (a) the petitioner was in our view entitled to invoke cl 5.2 of the guarantee agreement; and (b) prima facie a creditor who is not paid has a right to file a petition for a winding-up order whatever may be his other motives.*
>
> See also *Re Sanpete Builders (S) Re Ltd* [1989] 1 MLJ 393. It is not good law that only a creditor who feels goodwill towards his debtor is entitled to a winding-up order – *IOC Australia Ltd v. Mobil Australia Ltd* [1973] 49 ALJR 176 at p 182.

(emphasis added);

(b) the Court of Appeal's decision in *Dataran Rentas Sdn Bhd*;

(c) in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, at p. 260, Gopal Sri Ram JCA (as His Lordship then was) decided as follows in the Court of Appeal:

> *But a petition for winding up is not execution. For a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Companies Act. But the issuance of such a notice is not a sine qua non for the presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due.*

(emphasis added); and

(d) in *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817, at pp. 822-823, the petitioner company had not obtained a monetary judgment against the respondent company but yet, the Court of Appeal reversed the High Court's decision and wound up the respondent company on the ground of the respondent company's admission of indebtedness to the petitioner company. According to Jeffrey Tan JCA (as His Lordship then was) in *Lafarge Concrete (Malaysia) Sdn Bhd*, at pp. 822-823:

> **Before we proceed to answer those questions, we should perhaps say that 'a creditor is not required to obtain a judgment before serving a statutory demand** ...' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p. 83) and 'whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding-up order against a company which is insolvent' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p. 91). *Where there is no judgment, it is not uncommon for*

companies to argue that the debt is disputed. But 'in order to oppose a winding up petition, the respondent must raise a bona fide dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds – BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 MLJ 356' (Chan & Koh on *Malaysian Company Law* (2nd Ed), at para 22.145).

(emphasis added)

[29] There is nothing in the wording of s. 218(1)(e) CA to require the petitioner to obtain a monetary judgment before filing a winding up petition. It is clear that a creditor's right to present a winding up petition is a statutory one conferred by s. 217(1)(b) CA and unless Parliament expressly curtails that right, no such restriction in the form of a monetary judgment should be implied. In my view, the fact that s. 218(2)(b) CA presumes a respondent company's inability to pay debts when the execution of a judgment is not satisfied while s. 218(2)(a) and (c) CA do not rely on the existence of a monetary judgment, implies that the existence of a monetary judgment is not a condition precedent to the filing of a winding up petition.

Respondent Had Admitted Its Indebtedness To Petitioner

[30] After the petitioner's previous solicitors had served the statutory demand, the respondent's previous solicitors, Messrs "Jason Singh & Rakan-rakan" ('JSR'), sent a "without prejudice" letter dated 15 April 2013 to the petitioner's previous solicitors ('respondent's first admission') stating the following:

15th April 2013

Messrs Wan Sharizal, Hari & Co. **Without Prejudice**

…

Dear Sirs,

Re: Notice under Section 218 of Companies Act 1965

We refer to the above and to the meeting held on 08/04/2013 at our client's office which was attended by your Mr. Alex Tan and Encik Wan Syahrizal and our Cik Nurul Isnainie and Mr. Jason Singh.

Pursuant to the said meeting, we hereby write to confirm the followings [sic] as the terms for amicable settlement between parties:

(i) *That your client is agreeable to withdraw or caused to be withdrawn, the abovementioned Section 218 Notice dated 11/03/2013, provided that our client pays to your client a sum of RM605,300-00 being the 1st and 2nd Interim Payment for the work done within Three (3) months from the date of your client's acceptance of this settlement proposal*;

(ii) *That your client shall grant an automatic extension of time to our client to pay the sum as mentioned in Para (i) above, should there be a delay on part of our client's Banker in disbursing the progressive payment, provided that our client furnish with your client, the proof of submission of the progressive payments to the Bankers*;

A (iii) *That our client proposes that the sum of RM200,000-00, being the Cash Bond Deposit, to be refunded to your client directly from our client's Bankers, subject to the approval of it's [sic] submission for progressive claim and upon the full settlement of the Interim Payment as set out in Para (i) above.*

(iv) That your client shall ensure that all subcontractors to directly liaise
B with your client pertaining to the progressive claims instead of with our client.

Kindly revert with your client's favourable confirmation and thereafter, a settlement agreement will be prepared for execution by both parties.

(emphasis added)

C **[31]** The respondent's first admission was exhibited in the petitioner's affidavit in support of this petition. There was no objection by the respondent to the admissibility of the respondent's first admission as evidence in this petition. In fact, the respondent's affidavit affirmed by Encik Rosidi bin Abu Bakar on 17 September 2014, expressly referred to the respondent's first
D admission and denied that there was any admission of indebtedness by the respondent. In the circumstances, I hold that the respondent has waived its right to object to the admissibility of the respondent's first admission according to the following High Court cases:

E (a) the High Court's judgment in *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749, at pp. 758-760; and

(b) the decision of the Singapore High Court in *A-B Chew Investments Pte Ltd v. Lim Tjoen Kong* [1989] 2 CLJ 1109; [1989] 2 CLJ (Rep) 840; [1989] 3 MLJ 328, at pp. 331-332.

F **[32]** The respondent sent a letter dated 17 July 2013 to JSR ('respondent's second admission') stating the following:

[JSR]

…

G Tuan,

[Project]

Per: **Notice Under Section 218 of Companies Act 1965**

H Adalah kami, Pihak Gabungan Hartamas Sdn. Bhd. (GHSB) merujuk perkara di atas dan surat bertarikh 22hb April 2013 (No. Ruj. ...)

2. *Kami memohon jasa baik pihak Tuan untuk mendapatkan lanjutan tempoh pembayaran balik (RM605,3000.00) kepada Messrs Wan Shahrizal, Hari & Co iaitu wakil kepada pihak Prestige Global Resources Sdn. Bhd.*

I 3. **Setelah dikaji, pihak kami menganggarkan lanjutan tempoh masa tersebut adalah sehingga akhir tahun 2013**. Hal ini kerana, hal tanah pihak kami masih lagi di dalam proses yang melibatkan tuan-tuan tanah

bagi lot 579 dan Pihak Pejabat Tanah & Galian, Wilayah Persekutuan (PTGWP). Walau bagaimanapun, sekiranya perkara tersebut dapat diselesaikan dengan lebih awal, pihak kami akan memaklumkan kepada pihak Tuan dengan kadar segera.

4. Sehubungan dengan itu, kami lampirkan dokumen sokongan yang melibatkan hal tanah tersebut sebagai rujukan dan perhatian pihak Tuan.

5. Kerjasama dan tindakan segera pihak Tuan/Puan amat kami hargai.

(emphasis added)

[33] Surprisingly, the respondent's second admission was exhibited in the petitioner's affidavit in support of this petition. More surprisingly, the respondent did not object to the admissibility of the respondent's second admission and the respondent even alleged in its affidavit that there was no admission of indebtedness by the respondent in the respondent's second admission!

[34] The respondent's second admission clearly constitutes legal communication between the respondent and its then solicitors, JSR. Sections 126 and 128 EA as well as the Explanation to s. 23 EA are relevant and are reproduced below:

23. In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

Explanation - Nothing in this section shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under section 126.

126(1) *No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment*:

Provided that nothing in this section shall protect from disclosure:

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

128. **If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126**; and if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.

(emphasis added)

[35] In *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405, at pp. 419, 420, 422, 423 and 427 the Federal Court in a judgment given by Nik Hashim FCJ, decided as follows:

> *I agree with the appellant that the Court of Appeal, in taking the "loss of confidentiality" approach to determine loss of privilege, had failed to recognise the common law maxim "once privileged, always privileged" (see per Cockburn, CJ in Bullock & Co v. Corry & Co [1878] 3 QBD 356 at p. 358) as being embodied in ss. 126 to 129 of the Act*. This common law maxim has been endorsed and approved by the high authority of the House of Lords and Privy Council in the cases quoted earlier where the privilege was accepted as being absolute. The maxim has hitherto been followed in Malaysia as seen in the High Court case of *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1989] 3 MLJ 445, which was adopted by the learned trial judge in the present case ...
>
> **Hence, I hold that the legal professional privilege under s. 126 of the Act is absolute and it remains so until waived by the privilege holder, i.e. the client**. ...
>
> In the instant case, *s. 126 of the Act permits only one exception when privilege no longer applies ie, upon the express consent of the client given and directed to the advocate who is called to court to disclose the professional communication made to him by his client or the advice given by the advocate*. ...
>
> Thus, **the common law rule of waiver by implication or imputation is not recognized by the cases under either the Malaysian, Singapore or Indian Evidence Act**. ...
>
> **A document cannot be admitted as evidence if it is privileged even if it is in the hands of the opposite party. For example, if it is privileged, a document in the hands of an opposite party may be recovered back** (see *B v. Auckland District Law Society*, *supra*). **If it has wrongly been released to the opposite side in discovery proceedings or otherwise, it may be injuncted from use** (see *International Business Machines Corp*, *supra*).
>
> (emphasis added)

[36] In this petition, there is no room to apply proviso (a) and (b) to s. 126(1) EA so as to admit the respondent's second admission as evidence. It is clear that if proviso (a) or (b) to s. 126(1) EA applies in a particular case, legally privileged matters can be admitted as evidence even if there is a settlement between the parties – Explanation to s. 23 EA.

[37] Despite the respondent's failure to object to the admissibility of the respondent's second admission and the respondent's denial on affidavit of the respondent's second admission ('respondent's conduct'), this court cannot accept the respondent's second admission as evidence to be considered in this petition. The reasons for rejecting the respondent's second admission as evidence in this petition are as follows:

(a) based on *Dato' Anthony See Teow Guan*, there must be an "express consent" by the respondent under s. 126(1) EA for the petitioner to adduce the respondent's second admission as evidence. The respondent's conduct, in my view, does not constitute "express consent" required by s. 126(1) EA;

(b) if the respondent's conduct constitutes "express consent" under s. 126(1) EA, this will undermine the general rule of legal professional privilege embodied in s. 126(1) EA which has been described as "once privileged, always privileged";

(c) according to s. 128 EA, even if the respondent gives evidence at its own instance in this petition, the respondent "shall not be deemed to have consented thereby to such disclosure as is mentioned in s. 126" EA; and

(d) according to *Dato' Anthony See Teow Guan*, the fact that the petitioner has in its possession the respondent's second admission does not mean that the legal professional privilege attached to the respondent's second admission has been expressly waived or lost by the respondent under s. 126(1) EA.

[38] After the filing of this petition, the respondent sent a letter dated 12 August 2014 to the petitioner (respondent's third admission) wherein the respondent stated as follows:

> *Dengan itu adalah dimaklumkan di sini bahawa segala amaun yang dituntut oleh pihak Prestige Global Resources Sdn Bhd seperti yang dituntut akan dijelaskan setelah pihak kami memperoleh tuntutan bayaran tersebut dari pihak Institusi Kewangan yang terlibat*.
>
> (emphasis added)

[39] The respondent's first and third admissions clearly support this petition. In *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & Anor v. Official Receiver And Liquidator of Mosbert Acceptance Ltd* [1977] 1 LNS 109; [1978] 1 MLJ 57, at pp. 58-59, the Singapore Court of Appeal affirmed a winding up order made by the High Court based on an admission of indebtedness by the solicitors of the respondent company.

Test To Decide Whether Respondent Was Able To Pay Its Debts

[40] As to how the court should ascertain whether a company is able to pay its debts under s. 218(1)(e) CA, I refer to the following appellate judgments:

(a) in *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 1 LNS 44; [1980] 2 MLJ 53, the Privy Council dismissed an appeal against a winding up order made by the Singaporean Chief Justice in the High Court which had been affirmed by the Court of Appeal. According to Lord Edmund-Davies who delivered the Privy Council's opinion, at p. 54:

Before this Board Mr John Newey QC, has repeated his submission made in the Court of Appeal that the source of error has throughout been that the Chief Justice had exercised his discretion according to what counsel described as "the Buckley concept", whereas he should have adopted "the modern concept as propounded by the Court of Appeal in *In Re LHF Wools Ltd* [1970] Ch 27".

It is not entirely easy to see how the petitioner's case was presented at first instance, save that it was submitted that it would be more beneficial to all creditors if there were no winding-up. The learned Chief Justice's notes disclose that his attention was drawn to the observations of Jessel MR in *In re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246 253, at 253 that,

> *… it is not sufficient for the respondents, upon a petition of this kind, to say, 'We dispute the claim'. They must bring forward a prima facie case which satisfies the court that there is something which ought to be tried …*

There was also cited to the Chief Justice a passage from Buckley on the Companies Act, 13th edition, at p. 460, dealing with "commercial insolvency, that is, of the company being unable to meet current demands upon it", and containing the following observations, which are, in the opinion of the Board, impeccable:

> *In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.*

But the appellants' counsel referred the Board to an earlier passage (not referred to in the Chief Justice's notes) which he said contained what he described as "the Buckley concept". It is to be found at p. 450, and is in these words:

> **A creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the Act. He is not bound to give time**. And, notwithstanding a voluntary winding up, on proving his debt and that it remains unsatisfied he will be so entitled.
>
> It is not a discretionary matter with the court when a debt is established, and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it but, ordinarily speaking, it is the duty of the court to direct the winding up.

(emphasis added);

(b) the Privy Council's opinion in *Malayan Plant (Pte) Ltd* has been adopted by our Supreme Court in *Sri Hartamas Dvpt Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303. In *Sri Hartamas Development Sdn Bhd*, at pp. 307 and 308, Gunn Chit Tuan SCJ (as His Lordship then was) decided as follows:

> As an alternative ground regarding insolvency, it was contended by Mr Sri Ram that the learned Judge had applied the wrong legal test when he concluded that the appellant had not rebutted the statutory presumption and was therefore insolvent. *Counsel said that in the Court below the appellant had led evidence to show that it is the owner of landed assets worth more than RM500 million. The respondent did not dispute those facts in the Court below and there was therefore no challenge on that point. Nevertheless the learned Judge relied on the decision of the Privy Council in Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd. [1980] 2 MLJ 53, which held that the appellant had failed to show that it was not insolvent. Counsel submitted that the correct test would be met by answering a question: "Would the appellant be capable, if necessary, of paying all debts by a realisation of its assets, including any immovable property, and of carrying on some other business if its shareholders so wished out of the net amount realised after payment of all liabilities?". It was further submitted that it was no part of the test that a company should have the capability to meet its liabilities out of its own monies, and in support of that submission, the appellant relied on the decision of the Singapore High Court in Re Great Eastern Hotel (Pte) Ltd. [1989] 1 MLJ 161*.
>
> It was also submitted by Counsel that the *Malayan Plant* [1980] 2 MLJ 53 case is distinguishable from our present case in that in the *Malayan Plant's* case, the appellant did not put its case on the same footing as the present appellant. It was not contended in that case that the "quick assets" test did not apply because the company had large landed assets. All that was contended for was that it would be more beneficial to all creditors if there were no winding-up of its assets. Alternatively it was also submitted on behalf of the appellant that if the Privy Council had laid down any general principles in that case to govern the test for insolvency, then to that extent its decision was wrong and that the Supreme Court should not follow it. ...
>
> We ourselves have noticed that the Privy Council case of *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 was not referred to during arguments by the two Queen's Counsel who appeared before the Singapore High Court in the *Great Eastern Hotel (Pte) Ltd's* case [1989] 1 MLJ 161 for the reason that that case was concerned with s. 254(2)(c) of the Singapore Companies Act, and there is therefore no need for us to consider the two tests for insolvency referred to by the learned Judicial Commissioner in the Singapore case because under, s. 218(2)(a) of the Act, it is not necessary as in a case of a petition under s. 218(2)(c) of the Act for the petitioner to prove to the satisfaction of the Court that a company is unable to pay its debts or for the Court in determining

whether a company is unable to pay its debts, to take into account the contingent and prospective liabilities of the company. *In this case, the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with "commercial insolvency", that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the Malayan Plant case and cite the following observations from Buckley on the Companies Act (13th Edn) at p. 460*:

> *In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.*

(emphasis added);

(c) the Court of Appeal held as follows in *Pacific & Orient Insurance Co Bhd*, at pp. 961-962:

> When the creditor's debt as claimed in the 218 notice is clearly undisputed (as in the present case) and the debtor fails to comply with the order within the stipulated three weeks, the presumption that the company is unable to pay its debts or financially insolvent. The word "debts" (in plural) as appears in ss. 218(1)(e) and (2) refers to all the debts owed by the company to all creditors (if any), not only to the specific debt claimed by the creditors in the 218 notice in question.
>
> *In short, failure on part of a debtor to pay the particular debt claimed in the 218 notice within the stipulated three weeks period, will give rise to a statutory presumption that the company is insolvent or unable to pay all its existing debts owed to all creditors.*
>
> *The scope or the meaning to be given to the phrase 'unable to pay its debts' appearing in s. 218(1)(e) of the Companies Act 1965 is explained by McPherson J in his book "The Law of Company Liquidation (3rd edn)" at p. 54 as follows*:
>
> > *The phrase 'unable to pay its debts' is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often near-impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning to the phrase is insolvency in the commercial sense - that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realized would enable is to discharge its liabilities in full.*

The presumption is rebuttable and the onus is shifted to debtor company to show that it is able to pay all its debts at the material time. Such rebuttal may be done at the hearing of the petition, after being filed by the creditor. To pay the particular amount or debt claimed under the 218 notice after the expiry of the stipulated three weeks period (as being done by the appellant in the present case) is obviously insufficient to rebut the said presumption. Under such circumstances, the presumption remains and the winding-up court is empowered to wind-up the company. (see: *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1989] 1 LNS 170; *Europlus Corp Sdn Bhd v. Lim Wai Leong* [2003] 42 MLJ 1; *Re Lympne Investments Ltd* [1972] 1 All ER 385; *Cornhill Insurance Plc v. Improvement Services Ltd & Ors* [1986] WLR 114; and *Mann v. Goldstein* [1968] 1 WLR 1091).

When the debt is clearly established it follows that the court would not in general at any rate, interfere even though the company would appear to be solvent. (see: *Mann v. Goldstein* (*supra*). Vaisey J once said in the case of *In re a Company* [1950] 94 SJ 369:

> **Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them**.

(emphasis added); and

(d) in *Lafarge Concrete (Malaysia) Sdn Bhd*, at pp. 827-829, the Court of Appeal decided as follows:

The respondent asserted that it had unappropriated profits of RM2,759,276 for the year ended 31 December 2006. Perhaps the finances of the respondent were in the pink of health in 2006. But the finances of the respondent must have turned for the worse in 2007, for on 20 July 2007 the respondent informed the appellant that it 'was facing, severe cash flow problems and … [was] … restructuring its finances' and that it could only pay RM3,701.65 to the appellant (see 55AR). So, by July 2007, the respondent could not even pay what was a paltry sum of RM37,163.95 in comparison to the alleged unappropriated profits, and was unable to meet the current demand upon it.

The ability of a company to meet current demands upon it goes to the solvency or otherwise of a company …

'In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realise in time, to meet the debts as they become due. It is not sufficient that the assets might be realisable at some future date after the debts have become due and payable' (*Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449, 454, per Seah SCJ). **'The test of commercial insolvency simply means that the respondent company is unable to meet current debts as they fall due'** (*System Communication Engineering Sdn Bhd v. Zabidin Sdn Bhd* [1999] MLJU 55; [1999] 1

AMR 1187 per Abdul Malik Ishak J, as he then was). '... **the test for the insolvency of the respondent does not depend on the presence of their realisable assets**' (*Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd*) ...

The respondent who could not meet the current demand of the appellant was insolvent. The respondent produced its banking statements for the period August 2008-December 2008 (see 180-188 AR) to substantiate that it was a going concern. But those banking statements only substantiated that the respondent had no funds to meet the demand of the appellant at the material time. *Even when the petition was heard in 2009, there was still no evidence that the respondent had the funds and would meet the demand of the appellant. In those circumstances, the refusal of the winding up order was wholly unjust, for it altogether deprived the appellant of the remedy conferred by statute*. All said, the winding up order should have been made.

The winding up order should have been made even if the respondent was solvent (Cornhill Insurance plc v. Improvement Services Ltd and Ors [1986] 1 WLR 114, where it was held by Harman J that where a creditor's debt is clearly established, then the creditor has the right to present a winding up petition and obtain relief even though the company was solvent). 'Where the creditor's debt is clearly established it seems to me to follow that this court would not, in general, at any rate, interfere though the company would appear to be solvent ... to persist in non-payment ... would itself either suggest inability or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt' (*Mann v. Goldstein* [1968] 1 WLR 1091 per Ungoed-Thomas J). *The solvency of a company counts for nothing if it is not ready, willing and able to meet the demand of the creditor. The discretion to refuse winding up could be exercised if the respondent was ready, willing and able to meet the demand of the appellant* (see *Imperial Hydropathic Hotel Company, Blackpool, The v. Hampson, Re* (1882) 23 Ch D 1; [1883] 49 LT 147, 151, where the company was solvent and the creditor accepted the proposal to pay the debt within one month, the Court of Appeal (Jessel MR, Cotton and Bowen UJ) ordered the debt to be paid within one month, in default of which 'there will be the usual winding up order'). But it was not that in the instant case.

There was no genuine dispute. The respondent was insolvent. **The respondent was not ready, willing and able to meet the demand. Winding up should have been the foregone conclusion**.

(emphasis added)

[41] In *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5; [1988] 2 MLJ 447, the Supreme Court set aside a *Fortuna* injunction granted by the High Court. The Supreme Court in a judgment delivered by Wan Hamzah SCJ held as follows in *Chip Yew Brick Works Sdn Bhd*, at p. 449:

The only other ground of the respondent company to support its application for an injunction is to be found in its effort to show that it is solvent. It produced the balance sheet, the trading, contract, profit and loss account, a list of debtors and the amounts of their debts, and a list of creditors and the amounts due from them. All of these documents show the positions as at 30 November 1986 and on the basis of these documents it was contended that the balance after the amount of debts owing to the respondent company is reduced by the debts owed by it was $451,690.15 in favour of the respondent company. In our judgment this matter, if relevant at all, is a matter properly to be considered at the hearing of the petition, and it is premature to consider it at this stage.

(emphasis added)

It is to be noted that the material facts of *Chip Yew Brick Works Sdn Bhd* only concerned the issue of whether the High Court had correctly granted a *Fortuna* injunction. The winding up petition had not been filed, let alone heard, in *Chip Yew Brick Works Sdn Bhd*. Accordingly, the above *dicta* in *Chip Yew Brick Works Sdn Bhd*, in my respectful view, is merely *obiter*. I am further of the respectful view that the "commercial solvency" test, namely whether the respondent company is able to pay its current debts as and when such debts are due, as applied in the above Supreme Court's judgment in *Sri Hartamas Development Sdn Bhd* and by the Court of Appeal in *Pacific & Orient Insurance Co Bhd*, is the test to be applied in deciding whether the respondent is able to pay its debts under s. 218(1)(e) CA.

[42] Applying the "commercial solvency" test, it is clear to me that on a balance of probabilities, the respondent is unable to pay its debts when such debts are due. I decide as such because:

(a) until the date of hearing of this petition, except for the respondent's part payment (RM70,000), the respondent has not paid the two IPC's dated 28 November 2012 and 3 January 2013!;

(b) despite the termination by way of the letter dated 26 February 2013 from petitioner's solicitors, the respondent could not refund the deposit (RM200,000) and the retention sum (RM67,256.42) to the petitioner; and

(c) the respondent's first and third admissions clearly proved the respondent's commercial inability to pay its debts as and when such debts fall due.

[43] To fortify my finding that the respondent is commercially insolvent, I refer to a copy of a search of the records of the Companies Commission of Malaysia ('SSM') regarding the respondent ('SSM's search'). The SSM's search has been made by the petitioner on 25 June 2014 and is based on the information submitted by the respondent to SSM as of 29 October 2012. According to the SSM's search, for the financial year ending 31 December 2011:

(a) the respondent suffered a loss before tax amounting to RM96,998; and

(b) the respondent's liabilities exceeded its assets to the sum of RM98,430.

Respondent Has Failed To Rebut Presumption Of Insolvency Under s. 218(2)(a) CA

[44] Based on *Maril-Rionebel (M) Sdn Bhd*, a statutory demand under s. 218(2)(a) CA is not a condition precedent to the exercise of the court's discretionary power to wind up a company under s. 218(1)(e) CA.

[45] The petitioner has served the statutory demand on the respondent in this case. Upon the respondent's failure to pay the claimed sum as stated in the statutory demand, a rebuttable presumption of the respondent's insolvency arises under s. 218(2)(a) CA whereby the respondent has the legal burden to rebut such a presumption on a balance of probabilities. This is clear according to the following cases:

(a) the Supreme Court's judgment in *Sri Hartamas Development Sdn Bhd*; and

(b) the Court of Appeal case of *Pacific & Orient Insurance Co Bhd*.

[46] I should point out that in *Pac Asian Services Pte Ltd v. European Asian Bank AG* [1987] 1 LNS 143; [1989] 3 MLJ 385, at p. 388, the Singapore Court of Appeal construed s. 254(2)(a) of the Singapore's Companies Act (which is *in pari materia* with our s. 218(2)(a) CA) as follows:

> **The law is that if a petitioning creditor wishes to rely upon the 'deeming' provision in s. 254(2)(a) of the Act, strict compliance with the conditions set out therein is necessary**. Illustrations of the need for strict compliance with the statutory conditions can be found in *In Re Mannum Haulage Pte Ltd* (1974) SASR 451, *Re Alpina Pte Ltd* (1977) 2 ACLR 331, and *Re Willes Trading Pte Ltd* (1978) 3 ACLR 583. *There is a cogent reason for requiring exact compliance. The presumption that the company is unable to pay its debts does not appear to be a rebuttable one. The presumption immediately renders the company liable to be wound up by the High Court under s. 254(1)(e)* [*in pari materia* with our s. 218(1)(e) CA].
>
> (emphasis added)

[47] I am of the respectful view that the above *dicta* in *Pac Asian Services Pte Ltd* is *obiter* as the statutory demand in that case was not served on the respondent company's registered address. Hence, the statutory presumption could not apply in *Pac Asian Services Pte Ltd*. It is to be noted that the learned authors of "*Walter Woon on Company Law*", Revised 3rd edn. (2009), at p. 710, commented that the above *dicta* in *Pac Asian Services Pte Ltd* "is questionable as a matter of interpretation and authority". In any event, as a matter of *stare decisis*, I am bound to follow our appellate decisions in *Sri Hartamas Development Sdn Bhd* and *Pacific & Orient Insurance Co Bhd*.

[48] This court finds that the respondent has failed to adduce credible evidence to rebut the presumption of the respondent's insolvency under s. 218(2)(a) CA on a balance of probabilities. The reasons for this finding are as follows:

(a) the respondent's first and third admissions support, if not confirm, the presumption of the respondent's insolvency;

(b) the respondent has not adduced any evidence in respect of the value of its assets, liquid or otherwise, owned or controlled by the respondent; and

(c) the respondent did not exhibit any contract, business dealing or source of income which may be used by the respondent to pay its creditors, including the petitioner. No bank statements of the respondent has been exhibited in this petition.

Cases Cited By Respondent

[49] The following three cases relied on by the respondent, can be distinguished from this petition:

(a) in *Re Lympne Investments Ltd*, the English High Court dismissed the winding up petition because:

(i) the petition had been filed pre-maturely, namely before the expiry of the 21 days given in the statutory demand; and

(ii) there was a substantial dispute of the existence of debt due from the respondent to the petitioner;

(b) in *Mark Jaya Engineering Sdn Bhd*, the Malaysian High Court dismissed the winding up petition on the ground that there was a substantial dispute of the debt allegedly due from the respondent company to the petitioner company; and

(c) the filing of the winding up petition in *KNM Process Systems Sdn Bhd* was based on s. 218(2)(c) CA. In *KNM Process Systems Sdn Bhd*, the High Court did not rely on s. 218(1)(e) CA to dismiss the winding up petition.

Court's Decision

[50] Premised on the above reasons, the court allows this petition with costs whereby the respondent is ordered to be wound up and the official receiver be appointed as its liquidator.